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No. 92-2010

In the Supreme Court of the United States

OCTOBER TERM, 1993

AT&T FAMILY CREDIT UNION, ET AL., PETITIONERS

v.

FIRST NATIONAL BANK & TRUST COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Federal Credit Union Act states that "Federal credit union membership shall be limited to groups having a common bond of occupation or association." 12 U.S.C. 1759. The question presented is whether banks are within the zone of interests protected by the "common bond" requirement of the Act, so as to have standing, in an action under the Administrative Procedure Act, to challenge the government's approval of a credit union's expansion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 988 F.2d 1272. The opinion of the district court (Pet. App. 16a-25a) is reported at 772 F. Supp. 609.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1993. The petition for a writ of certiorari was filed on June 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Because the district court dismissed respondents' complaint, this statement assumes the factual allegations of respondents' amended complaint to be true.

1. The Federal Credit Union Act (FCUA or Act), 12 U.S.C. 1751-1795k, authorizes the formation and regulation of federal credit unions and charges the National Credit Union Administration (NCUA) with administering the Act. The NCUA is responsible for, among other things, ruling on applications for federal credit union charters and amendments to such charters. 12 U.S.C. 1754. The Act contains various requirements regarding the field of membership of a federal credit union. As relevant here, the Act provides that federal credit union membership shall be limited to "groups having a common bond" of occupation, association, or location. 12 U.S.C. 1759.[1]

Pursuant to its power to prescribe rules and regulations for the administration of the Act, see 12 U.S.C. 1766(a), the NCUA has on several occasions exercised its authority to regulate credit union membership. In particular, the NCUA has defined a "common bond" as "the sharing of some unifying factor or characteristic among persons that simultaneously links them together and distinguishes them from the general public." 45 Fed. Reg. 8280, 8285 (1980). In addition, the NCUA has interpreted the statutory directive that credit union membership be limited to "groups having a common bond" to allow more than one occupational or associational group to be included within the field of membership of a federal

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[1] The field of membership is important for several reasons. The credit union generally may make loans only to its members or other credit unions, 12 U.S.C. 1757(5); it is funded by shares purchased by its members, 12 U.S.C. 1757(6); and it is run democratically, with each member entitled to one vote, 12 U.S.C. 1760.

credit union as long as each group has a common bond. That interpretation is set forth in a series of Interpretive Ruling and Policy Statements (IRPS). See 47 Fed. Reg. 26,808 (1982) (IRPS 82-3); 48 Fed. Reg. 22,899 (1983); 49 Fed. Reg. 46,536 (1984) (IRPS 84-1); 54 Fed. Reg. 31,165 (1989) (IRPS 89-1).

2. This case involves the NCUA's application of the common bond requirement to petitioner AT&T Family Federal Credit Union (Family Federal). At one time, Family Federal primarily served the employees of AT&T Technologies, Inc., AT&T Network Systems, and Bell Telephone Labs. Pet. App. 4a. In recent years, however, Family Federal received approval from the NCUA to expand its membership to include the employees of other employers, such as Black & Decker and Duke Power Company. C.A. App. 13. In 1989 and 1990, the NCUA approved applications allowing members of 16 new employee groups to become members of Family Federal. Pet. App. 4a; C.A. App. 19-23.

3. The plaintiffs in this case, respondents here, are four North Carolina commercial banks and the American Bankers Association in its representative capacity (collectively, the Banks). C.A. App. 23-26. The banks filed this action against the NCUA in the United States District Court for the District of Columbia in December 1990. *Id.* at 3. Family Federal and the Credit Union National Association later intervened as defendants. *Id.* at 4a. The action was brought under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* C.A. App. 8.

The Banks alleged that the NCUA's approval of Family Federal's applications violated the common bond requirement. C.A. App. 20-21. Each bank alleged that NCUA's approvals of Family Federal's expansion subjected it "to unlawful competition in its business or potential business." *Id.* at 23-24. The banks asked the

court to declare unlawful NCUA's approval of Family Federal's prior applications to serve unrelated employee groups and to "[p]ermanently enjoin[] defendants from approving credit union membership or services to select employee groups unrelated to the AT&T employee group." *Id.* at 28.

The district court granted the NCUA's motion to dismiss this action for lack of standing. C.A. App. 37-47. The court observed that, under D.C. Circuit precedent concerning the "zone of interests" test:

> [t]hose not regulated by an agency have standing only if they are the intended beneficiaries of the specific statute or are nonetheless "suitable challengers" to the statute because their interests coincide with the interests which Congress did intend to protect. A party is a suitable challenger if its interests coincide systematically, and not simply fortuitously, with the interests of those whom Congress intended to protect.

Id. at 42 (citing *Hazardous Waste Treatment Council* v. *Thomas*, 885 F.2d 918 (D.C. Cir. 1989), and *Hazardous Waste Treatment Council* v. *United States Environmental Protection Agency*, 861 F.2d 277 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989)). Applying that approach, the district court first determined that banks were not the intended beneficiaries of the FCUA, in general, or of the common bond requirement, in particular.[2]

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[2] The court distinguished *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388 (1987), which held that a competitor had standing to challenge an administrative decision that permitted a bank to enter a line of business allegedly in violation of a statute restricting such entry, on the ground that the "common bond" requirement of the Federal Credit Union Act was not intended to be a restriction on entry. Pet. App. 24a-25a.

The court next determined that banks are not "suitable challengers to actions taken under the authority of the FCUA." C.A. App. 44. The court noted that the Fourth Circuit had reached the same conclusion "when presented with facts virtually identical to these" in *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d 621 (1986), cert. denied, 479 U.S. 1063 (1987).

4. The court of appeals reversed and remanded. It stated that, "[a]lthough we agree with the district court that the [banks] were not intended beneficiaries of the FCUA, we think that they are suitable challengers because the statute arguably prohibits the competition of which they complain." Pet. App. 2a.

The court of appeals concluded that "[t]his case * * * falls within the rationale of" *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388 (1987), and *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971). Pet. App. 2a. It gleaned from those decisions "the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect." *Id.* at 9a. That principle applied here, the court of appeals determined, because "[l]ike more classic entry restrictions, the common bond requirement * * * effectively prevents the credit union from offering its services and competing in a broader market." *Ibid.*

DISCUSSION

We agree with petitioner Family Federal that the respondent banks are not within the zone of interests protected by the common bond provision of the Federal Credit Union Act. Moreover, as petitioner points out, the decision below conflicts with the Fourth Circuit's decision in *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d

621 (1986), cert. denied, 479 U.S. 1063 (1987). We nonetheless believe that further review is not warranted at this time because the case is in an interlocutory posture.

To date, the proceedings in this case have addressed only the zone-of-interests question. The district court dismissed the action on the ground that the respondent banks are outside the zone of interests protected by the Act; it accordingly had no occasion to address the merits of this case—*i.e.*, the validity of the NCUA's interpretation of the statutory "common bond" requirement, which permits federal credit unions to include select employer groups that do not have a common bond, as long as members within each group do have a common bond. The court of appeals likewise had no occasion to address the merits of the case, but instead remanded to the district court to consider the common bond issue in the first instance.

Although there is considerable force to petitioner's submission that the circuit conflict on the threshold issue of standing should be resolved now, on balance we do not urge the Court to do so. Permitting the case to proceed on the merits in the district court could conserve judicial resources, including those of this Court. After the district court rules on the merits, it can reasonably be anticipated that there will be a new round of proceedings in the court of appeals. Those proceedings might result in the filing of another petition for a writ of certiorari. In that event, this Court would have the opportunity to review the standing question, as well as the question of the validity of the NCUA's interpretation of the Act, in a single proceeding. Compare *Clarke*, 479 U.S. at 393-394 (Court grants certiorari to review issue of standing and issue of validity of Comptroller of the Currency's statutory interpretation).

We therefore suggest that the Court await final resolution of the case by the lower courts before considering certiorari.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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